



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

PORTSMOUTH FIREFIGHTERS, IAFF
LOCAL 1313

Complainant

v.

CITY OF PORTSMOUTH

Respondent

CASE NO. F-0106:22

DECISION NO. 95-101

APPEARANCES

Representing Portsmouth Firefighters:

Shawn Sullivan, Esq.

Representing City of Portsmouth:

Thomas Cayten, Esq.

Also appearing:

Randal Sage, Fire Commissioners
Mike Varney, Portsmouth Firefighters
Rick Duddy, Portsmouth Firefighters

BACKGROUND

The Portsmouth Firefighters, Local 1313, I.A.F.F. (Union) filed unfair labor practice (ULP) charges against the City of Portsmouth (City) on May 24, 1995 alleging violations of RSA 273-A:5 I (h) because the City failed to apply certain provisions of the Americans with Disabilities Act (ADA) under CBA Section II and, in effect, disciplined a grievant, also under Section II, without just cause. The City filed its answer on June 7, 1995.

This matter was then heard by the PELRB on September 26, 1995. The record in this matter was held open until October 10, 1995 to permit the parties to file post-hearing briefs, all of which were received on or before that date.

FINDINGS OF FACT

1. The City of Portsmouth is a "public employer" of persons employed at its Fire Department within the meaning of RSA 273-A:1 X.
2. The Portsmouth Firefighters, Local 1313, IAFF is the duly certified bargaining agent for firefighters employed at the City's Fire Department.
3. The City and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1991 to June 30, 1992, continuing by virtue of an automatic renewal clause contained at Article XV thereof and the status quo doctrine, during all times pertinent to these proceedings.
4. The CBA contains a grievance procedure at Article X which concludes with a final and binding arbitration process. An employee in the bargaining unit was given a provisional promotion to Lieutenant on February 17, 1993. On May 3, 1993, that same employee was involved in a motor vehicle accident in Maine and was charged with operating under the influence (OUI). On September 19, 1993, the employee pled guilty to the OUI charge. This caused the chief of the fire department to question whether the employee's provisional promotion should be allowed to ripen into a permanent promotion.
5. On October 10, 1993 labor and management representatives met. Both the provisional promotee and Union Executive Board member Richard Duddy attended. The promotee, a twenty year veteran of the department, suffers from Post Traumatic Stress Disorder (PTSD) which has led to his abusing alcohol periodically. Both the promotee and Duddy claim to have

raised the promotee's PTSD with management at that meeting. Duddy further claims that the promotee is protected by the Americans with Disabilities Act (ADA) and that other members of the department have been convicted of OUI/DWI without having discipline imposed by the employer. Chief Sage, in his testimony, recalled the October 10, 1993 meeting and remembered both disparate treatment and PTSD being discussed. Conversely, Sage denied that the ADA and its protections were discussed. His first recollection of the ADA being mentioned was in the Union's post-hearing arbitration brief.

6. On October 13, 1993, the Portsmouth Fire Commissioners met for its regular monthly meeting. After its regular agenda and in executive session, it invited the promotee and his representative, Duddy, to offer reasons why the promotee should remain on the promotion list rather than having that promotion rescinded. On November 10, 1993, the Commission deliberated on the issue of the promotee's provisional promotion and subsequently rescinded that promotion.
7. On December 16, 1993, the Union appealed the decision of the foregoing promotion to arbitration under CBA Article X. An arbitration hearing was held in Portsmouth on November 9, 1994 on the stipulated issue of whether "the Fire Commission breach[ed] the Labor Agreement with IAFF Local 1313 when it rescinded the provisional promotion [of a] probationary lieutenant... for being convicted of operating a motor vehicle while under the influence of alcohol?" In a decision dated November 24, 1994, the arbitrator found that the fire commission had not violated the CBA under the issue as set forth above. In that decision, the arbitrator addressed the issue of the ADA saying in pertinent part, "it may well be that [the grievant's] efforts-- completely stopping drinking alcoholic beverages, actively engaging in all of the steps required for his treatment, be invested in that process, and successfully working through the counseling

path, entitled him to protection under the ADA. Its language as to non-discrimination may be clearly controlling of the Grievant's legal rights. Nonetheless, I do not have jurisdiction of that question, absent the parties' agreement that I should address it for purposes of resolving the matter under their private dispute resolution system."

8. In filing this ULP, the union has claimed that the arbitration process was not followed under Article X, thus the CBA was breached and a ULP occurred under RSA 273-A:5 I (h) when the arbitrator failed to incorporate ADA protections under Section II, Management Rights, provisions of the contract. The language of Section II cited by the Union provides, in pertinent part:

The City and the Fire Commission, as appropriate, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the Laws of the Constitution of the State of New Hampshire and of the United States....

- M. To determine the qualifications and competency of employees to perform available work subject to the terms of this agreement

DECISION AND ORDER

We do not extend the coverage of the management rights clause of the contract to the ADA. The evidence before us is not convincing that the parties ever contemplated such breadth of coverage either when the management rights clause or when the grievance procedure clause of the CBA was negotiated. For that matter, the ADA did not go in effect until July 26, 1992, almost a month after the contract containing the management rights clause in question would have expired on June 30, 1992. Conversely, the CBA does not, and cannot, preclude an individual from exercising rights conferred by the ADA, 42 U.S.C., Section 12101 et seq. Those rights are controlled by statute which, under our findings, are not enforceable through the CBA, but rather through an agency of the Federal Government.

The ULP is hereby DISMISSED. Any other requests for relief are denied.

So ordered.

Signed this 8th day of November, 1995.


EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding.
Members Richard W. Roulx and E. Vincent Hall present and voting.